

# Strategic & Legal Issues in the Use of Health Care Experts in RAC Administrative & Judicial Appeals



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**Admitted VA, NY, DC, FL, MA**

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# ***Alan S. Goldberg***

- **JD Boston College Law School 1967**
- **LLM (Tax) Boston University 1978**
- **LT JAGC Prosecutor US Navy**
- **Past Pres., Fellow, Amer. Health Lawyers As'n**
- **39 yrs. Goulston & Storrs Boston/DC until 2006**
- **Solo Practitioner, McLean, Virginia**
- **Adjunct Prof. of Health Law**
- **George Mason University School of Law & College of Health & Human Services**

# *McLean, Virginia*




# *Medicare Disallowance Appeals*

*Standards of  
Medical  
Practice*



*Federal Law  
CMS Policies  
Carrier  
Decisions*



*Evidence  
Physician  
Experts*



*Burden On Provider*

# ***Reopening***

- **Reopening is remedial action taken to change final determination or decision that resulted in either overpayment or underpayment**
- **Even though determination or decision was correct based on the evidence of record**

# ***Evidence***

- **Reliable evidence means evidence that is relevant, credible, & material**

# ***Reopening Evidence***

- **Contractor may reopen & revise initial determination or redetermination**
- **Within 1 year from initial determination or redetermination for any reason**
- **Within 4 years from initial determination or redetermination for good cause**
- **At any time if there exists reliable evidence that initial determination was procured by fraud or similar fault**



# **Redetermination Request**

- **Explain why provider disagrees with contractor's determination**
- **Include any evidence that should be considered by contractor in making redetermination**



# **Independent Review of Initial Determination**

- **Contractor reviews evidence & findings upon which initial determination was based, and**
- **Any additional evidence submitted or obtained by contractor**
- **Individual not involved in making initial determination must make a redetermination**
- **Contractor may raise & develop new issues that are relevant to claims**

# ***Redetermination***

- **Clear statement indicating extent to which redetermination favorable or unfavorable**
- **Summary of facts, including, as appropriate, summary of clinical or scientific evidence used in making redetermination**
- **Explanation of pertinent laws, rules, coverage rules, & CMS policies**
- **Summary of rationale for redetermination in clear, understandable language**

# ***Redetermination***

- **Any specific missing documentation that must be submitted with request for a reconsideration**
- **All evidence to be introduced during appeals process should be submitted with reconsideration request**
- **Evidence not submitted to QIC is not considered at ALJ hearing or further appeal, unless provider demonstrates good cause as to why not provided previously**
- **Procedures for obtaining additional information concerning redetermination, such as specific provisions of policy, manual, or regulation used in making redetermination**

# **Evidence Submitted With Request**

- **Present evidence & allegations of fact or law related to issue in dispute & explain disagreement with redetermination**
- **Evidence must include any missing documentation identified in notice of redetermination**
- **Absent good cause, failure to submit all evidence, including documentation requested in notice of redetermination prior to issuance of the notice of reconsideration precludes subsequent consideration of that evidence**

# ***Hiring Experts***

- **Attorney-client privilege**
- **Individual patient case analysis**
- **Professional & academic literature**
- **Clinical trials**
- **Written & verbal testimony  
favorable to provider & care**

## ***Independent On the Record Review of Redetermination***

- **QIC reviews evidence & findings upon which initial determination & redetermination based, & any additional evidence provider submits or QIC obtains**
- **Finding regarding whether item or service is reasonable & necessary for diagnosis or treatment of illness or injury must involve consideration by panel of physicians or other appropriate health care professionals**
- **Based on clinical experience, the patient's medical records, & medical, technical, and scientific evidence**

# ***Physician Evidence***

- **Where claim pertains to furnishing of or provision of items or services by physician, a reviewing professional must be a physician**
- **Decision to be made upon the basis of evidence of record**
- **QIC must issue reconsideration affirming or reversing, in whole or in part, the initial determination, including the redetermination**



# ***Medical Standards***

- **Clinical practice guidelines**
- **American Recovery & Reinvestment Act of 2009 provides \$1.1 billion for comparative effectiveness research**
- **Evidenced based medicine**
- **Community standards**

# ***Reconsideration***

- **Summary of facts including clinical or scientific evidence used in making reconsideration**
- **Explanation of how pertinent laws, regulations, coverage rules, & CMS policies, apply to the facts of case including rationale for declining to follow LCD, LMRP, or CMS program guidance**
- **In case of a determination on whether an item or service is reasonable or necessary, an explanation of medical & scientific rationale for decision**
- **Summary of rationale for reconsideration**

# ***Reconsideration***

- **Summary must also specify all evidence including evidence requested in notice of redetermination that is not submitted prior to issuance of the reconsideration will not be considered by ALJ or made part of administrative record, unless provider demonstrates good cause as to why evidence was not provided prior to issuance of reconsideration**
- **Procedures for obtaining additional information concerning reconsideration, such as specific provisions of policy, manual, or regulation used in making reconsideration**

# ***Administrative Law Judge Decision***

- **Issues before ALJ include all prior issues presented that were not decided entirely in provider's favor**
- **If evidence presented before hearing causes ALJ to question a favorable portion of prior determination, ALJ notifies parties before the hearing & may consider that issue at the hearing**
- **Provider has right to appear before ALJ to present evidence & to state a position**
- **Written decision gives findings of fact, conclusions of law, & reasons based on evidence offered at hearing or otherwise admitted into the record**

# ***Medicare Appeals Council***

- **MAC limits review of evidence to evidence contained in record of proceedings before ALJ**
- **If hearing decision decides new issue that parties were not afforded an opportunity to address before ALJ, MAC considers any evidence related to that issue submitted with request for review**
- **If MAC determines that additional evidence is needed to resolve issues and hearing record indicates that previous decision-makers have not attempted to obtain the evidence, MAC may remand case to ALJ to obtain the evidence & issue a new decision**

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